2004

# Patty Hevelone v. City Market Inc, and Barlow Nielsen Associates, Inc., John Does 1-5 : Brief of Appellant

Utah Court of Appeals

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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PATTY HEVELONE,

Plaintiff-Appellant,

vs.

CITY MARKET, INC.

A Colorado Corporation,

Defendant-Appellee

AND BARLOW NIELSEN

ASSOCIATES, INC.,

JOHN DOES 1-5

Defendants.

Case No. 20040481 CA

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# BRIEF OF APPELLANT

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Appeal from the Seventh Judicial District Court

in and for Carbon County, State of Utah

Honorable Bruce K. Halliday, presiding.

Category No. 10

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TABLE OF CONTENTS

ADDENDUM:

## TABLE OF AUTHORITIES

CASES — PAGE

STATUTES AND ORDINANCES:



RULES:

# JURISDICTION

Jurisdiction for this appeal was proper before the Utah Supreme Court pursuant to Utah Code Ann. Section 78-2a-3 (2) (H) (1996). However, the Utah Supreme Court entered it=s Order of June 9, 2004, and transferred this matter to the Utah Court of Appeals for disposition pursuant to Section 78-2-2 (4), Utah Code Ann. (ROA p. 225).

# ISSUES ON APPEAL AND STANDARD OF REVIEW

## Issues on Appeal

**Issue One:** The Trial Court erred in granting summary judgment based on City Market's argument that under current Utah premise liability law, a business owner has no duty to its business invitees when the invitees are outside the four walls of the building leased by the business owner.

**Issue Two:** The Trial Court erred in granting summary judgment while discovery was ongoing and numerous facts were disputed which were directly related to the theories of recovery. Additionally, the trial court reversed the burden of proof with respect to those disputed facts when they are being considered as part of a summary judgment motion.

**Standard of Review**

On May 13, 2003, the Utah Supreme Court reversed Judge Halliday in Smith v. Four Corners Mental Health Center, Inc., 70 P.3d 904, 2003 UT 23 (Utah 05/13/2003) and provided a detailed standard of review to be applied by an appellate court when it is reviewing a grant of summary judgment:

> On an appeal of a district court's entry of summary judgment, the appellate court applies the same standard as applied by the district court. City Consumer Serv. v. Peters, 815 P.2d 234, 239 (Utah 1991); Durham v. Margetts, 571 P.2d 1332, 1334 (Utah 1977). According to that standard, summary judgment is only appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). "'When reviewing a trial court's decision to grant summary judgment, we (appellate court) examine the court's legal conclusions for correctness.'" Young v. Salt Lake City Sch. Dist., 2002 UT 64, ¶ 10, 52 P.3d 1230 (quoting Tustian v. Schriever, 2001 UT 84, ¶ 13, 34 P.3d 755). "If, after a review of the record, it appears that there is a material factual issue, we are compelled to reverse the trial court's grant of summary judgment." W. Farm Credit Bank v. Pratt, 860 P.2d 376, 378 (Utah Ct. App. 1993) (citing Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 957 (Utah Ct. App. 1989)).
>
> For a moving party to be entitled to summary judgment, it must establish a right to judgment based on the applicable law as applied to the undisputed facts. See Utah R. Civ. P. 56(c); Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc., 789 P.2d 24, 25 (Utah 1990). We have noted that summary judgment "should be granted only when all the facts entitling the moving party to a judgment are clearly established or admitted." Sorenson v. Beers, 585 P.2d 458, 460 (Utah 1978). For summary judgment to be appropriate, these

undisputed facts provided by the moving party must "preclude, as a matter of law, the awarding of any relief to the losing party." FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332, 1334 (Utah 1979); see also Staker v. Ainsworth, 785 P.2d 417, 419 (Utah 1990) ("[T]here must exist undisputed facts in the evidence before the trial court relating to each of the elements of the legal doctrine upon which the trial court rests its decision to grant summary judgment in order for us to affirm the ruling.").

Once the moving party has presented sufficient evidence to support the claim for judgment as a matter of law, the burden shifts to the non-moving party to provide evidence creating an issue of material fact. According to the Utah Code of Judicial Administration, "[a]ll material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement." Utah Code Jud. Admin. 4-501(2)(B). "A party opposing the motion is required only to show that there is a material issue of fact. Affidavits and depositions submitted in support of and in opposition to a motion for summary judgment may be used only to determine whether a material issue of fact exists." Lamb v. B&B;Amusements Corp., 869 P.2d 926, 928 (Utah 1993). Therefore, "when the moving party has presented evidence sufficient to support a judgment in its favor, and the opposing party fails to submit contrary evidence, a trial court is justified in concluding that no genuine issue of fact is present or would be at trial." Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 957 (Utah Ct. App. 1989) (citing Dupler v. Yates, 10 Utah 2d 251, 269, 351 P.2d 624, 636-37 (1960)). The existence of even one question of fact precludes us from granting summary judgment on these alternative arguments.

Quoting Smith,¶13,¶24,¶53.
[Note: Rule 4-501 has been subsequently repealed.]

**Preservation of Issues**

Both issues were preserved in Plaintiff's Objection to Defendant City Market's Motion for Summary Judgment and the Memorandum offered in support there of (ROA p. 170), including the Affidavit of the Price City officer Penovich and the Price City documents attached thereto (ROA p. 179-185; Addenda E); and during oral argument, a transcript of which is a part of the Record on Appeal (ROA p. 230).

## DETERMINATIVE AUTHORITY

While not necessarily determinative of the issues, the following Utah Rules of Civil Procedure, Utah Statutes and Price City Ordinances are cited in this brief and are included in their entirety in the Addendum:

**Utah Rules of Civil Procedure:**

Rule 56, Utah Rules of Civil Procedure, Summary Judgment, Addenda A

Rule 52, Utah Rules of Civil Procedure, Findings by the Court, Addenda A

**Applicable Ordinances:**

Price City, Utah, Ordinance #. 6-4-J and L, Addenda B

Price City, Utah, Ordinance # 6.4.13, Addenda B

# STATEMENT OF THE CASE

## Nature of the Case and Course of the Proceedings

Plaintiff/Appellant originally filed her complaint and asserted claims of negligence against the Utah State Retirement Office; Barlow Nielsen Associates, Inc.; City Market, Inc. and unnamed John Does. Defendant Utah State Retirement Office was dismissed without objection. Neither Defendant City Market or Barlow Nielsen filed cross-claims against Defendant Utah State Retirement Office although each alleged a contractual relationship under lease/management agreements with said defendant and neither is barred from enforcing their contractual rights by the Utah Governmental Immunities Act (Transcript of Oral Argument p. 12 line 3). (See Section 63-30d-301, UCA, Addenda C ).

No lease agreements or other contracts have ever been placed into evidence by any of the defendants and the rights and responsibilities of the defendants under the alleged contracts were merely asserted by Defendant City Market in a summary judgment motion consisting of seven pages and unsupported by sworn affidavit or evidence of any kind (ROA p. 152)..

Plaintiff/Appellant asserted claims of negligence against Defendant City Market, Inc. contending that said Defendant knew or should have known of the

clearly observable and dangerous condition directly adjacent to and with 12 feet of its only public business entrance and that, even if they did not control or create it, they had a duty to warn their invitees of its presence. Additionally, Plaintiff/Appellant alleged and proffered evidence from the Price City records that said defendant has consistently represented having had actual control over the exact area where the dangerous condition existed in its business license applications to Price City.

Plaintiff/Appellant additionally alleged that Defendant Barlow Nielsen Associates, Inc., is the party responsible for the negligent repair and/or construction which created the hazard and injured the Plaintiff/Appellant. The claims against Defendant Barlow Nielsen Associates, Inc. are still pending before the Court.

The current order under appeal dismissed Defendant City Market, Inc. with prejudice, and certified the judgment as a final judgment pursuant to Rule 54 (b), Utah Rules of Civil Procedure (Addenda G; ROA p. 213).

**Disposition in the Trial Court**

This is an interlocutory appeal taken from an order of the Carbon County Seventh District Court which granted summary judgment in favor of Defendant City Market, Inc. and dismissed all claims against said Defendant with prejudice on May 3, 2004. This appeal involves a multiple-party, multiple-claim case and the judgment has

been certified as a final judgment by the trial court pursuant to Rule 54 (b), Utah Rules of Civil Procedure. Plaintiff/Appellant's claims against Defendant Barlow Neilson are still pending in the trial court.

**Statement of Facts**

1. Defendant City Market does not own the building in which it conducts business or the common area that surrounds same. City Market asserts that it leases the building but denies any responsibility for the common areas of the shopping center where its market is located. (ROA p. 156).

2. City Market has never proffered its lease into evidence. As of the date of the motion for summary judgment, the trial court had no sworn affidavits or evidence of any kind to support the assertions made by City Market concerning its rights and responsibilities, or lack thereof, in the common areas although disputes concerning the validity of those assertions were raised by Plaintiff and supported by a sworn affidavit from the Price City offices and city documents. (Aff. of Penovich, Addenda E; ROA p. 179-185).

3. In 1980, City Market applied for a Price City business license and tendered a site plan designating itself as the tenant of the building and the surrounding common area, inclusive of the parking lot and fire lane adjacent to the store. Pursuant to Price

City Ordinance No. 6-4-J and L, now 6.4.13 (Addenda B; ROA p. 183-184), no business license can be issued unless a business has sufficient parking stalls and fire lanes designated for its customers on its site plan. At all times since the issuance of City Market's original business license, said business has represented to Price City that the parking area and the fire lane are part of its designated common area and City Market has has utilized same for the benefit of its business operations. (Aff. of Penovich from Price City and site plan attached thereto, Addenda E, ROA p.179-185).

4. Prior to the evening of January 27, 1998, the parking area and fire lane utilized by City Market, as well as the rest of the common area for the entire shopping center, had been involved in a construction/re-paving project. The project was concluded at least days, if not weeks, before the Plaintiff was injured. The effects of that project were known or should have been known to City Market because it was only a few feet away from the main store entryway and affected the entire parking and fire lane area for the store. (Addenda D;).

5. City Market alleges contractual relationships with defendant Barlow-Nielsen Associates, Inc., property managers, and the Utah State Retirement Office, owner of the property.

6. In the early evening hours of January 27, 1998, the plaintiff arrived at City Market's retail grocery store in Price, Utah for the purposes of purchasing various items of merchandise, including three cases of soda pop. (Addenda D).

7. No signs warned customers of the hazardous hole and jagged asphalt which subsequently injured Plaintiff/Appellant even though the hazard was only a few feet (estimated at 10-12 feet) from the main entrance to the store. (Addenda D).

8. Pursuant to paragraph 10 of Plaintiff=s Complaint, a large area had been left with a deep opening and was unbarricaded or unmarked in anyway. Since it was dark, Plaintiff was unable to see the unmarked hole, which was in the main travel pattern between the store's customary parking area and the only public entrance to the store. (Addenda D).

9. As the plaintiff pushed her loaded cart toward her car, which was parked in City Market=s customary main parking area, the front right wheel of the shopping cart rolled off of the cement apron of the store's entrance and dropped into the large hole located where the new asphalt met the cement. This caused the shopping cart to lunge frontward into the hole. As it did so, the back of it hit the plaintiff with such force that it knocked her down. (Addenda D).

10. Pursuant to paragraph 12 of Plaintiff=s Complaint, the existence of a deep, unbarricaded opening was an obvious hazard in the fire lane immediately adjacent to

the entrance and exit of the business. City Market knew or should have known that persons would be traveling to and from the store entrance from the parking lot and that an open hole in the pavement would be a hazard, particularly during nighttime hours. (Addenda D).

11. Plaintiff sustained substantial injuries as a result of the negligence of defendant City Market in leaving the hole unmarked and unbaricaded and failing to warn or otherwise protect its business invitees while City Market continued to leave its doors open for operation and its parking lots available to the public during nighttime store hours.

12. Defendant City Market filed its motion for summary judgment while discovery was still ongoing. On the same day that said Motion was orally argued, and just prior thereto, Defendant Barlow-Nielson deposed the Plaintiff. Her deposition testimony established that the City Market Manager Sonny had a conversation with the Plaintiff/Appellant on or about the date of her injury wherein he acknowledged that other people had been injured in the same hazard before the Plaintiff/Appellant and that said manager had subsequently caused a stop sign, installed in a stand, to be placed in the hole to prevent further injury. (Plaintiff's Depo. line 15 p. 134--line 21 p. 137; Addenda H). These facts were raised at the oral argument on the motion that afternoon. (Transcript of hearing p. 10-28, ROA 230).

## SUMMARY OF ARGUMENT

The Plaintiff/Appellant contends that the trial court erred in granting summary judgment because it misconstrued and misapplied the Utah premises liability law. The trial court basically concluded that a business owner has no duty to its business invitees for hazards that exist in areas outside of the leased premises. The trial court's analysis was not consisted with Utah Supreme Court's standard of review for summary judgment cases as outlined in the Smith case nor with this Court's analysis of Utah's premises liability law as outlined in the Carlile case.

Additionally, Plaintiff contends that the trial court erred in granting summary judgment where there were disputed issues of fact that were material to the theories of liability in the case, any one of which was sufficient to defeat summary judgment under the standards set forth in the Smith case. The court did not require the moving party to produce any evidence to support the motion for summary judgment nor did the court require the moving party to refute the sworn affidavit and supporting evidence offered by Plaintiff. The court did not require the moving party to carry the burden of proof outlined in Smith. On the contrary, a review of the trial court's memorandum decision indicates that the court actually reversed the burden of proof and placed it on the opposing party/Plaintiff.

# ARGUMENT

## POINT ONE: THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BASED ON CITY MARKET'S ARGUMENT THAT UNDER CURRENT UTAH PREMISES LIABILITY LAW, A BUSINESS OWNER HAS NO DUTY TO BUSINESS INVITEES WHEN THE INVITEES ARE OUTSIDE THE LEASED PREMISES.

Plaintiff shall reserve for Point Two the issue of the disputed facts concerning what actually constitutes the leased premises in the case at bar and shall turn first to an analysis of the current status of premises liability law in Utah. In Carlile v Wal-Mart, 61 P.3d 287, 2002 UT App 412 (Utah App. 12/12/2002), the Court of Appeals summarized the current status of Utah law on this subject and stated as follows:

> The Utah Supreme Court has recognized two classes of negligence cases in which a store owner can be held liable: "In the first class, a store owner must have either actual or constructive knowledge of the hazardous condition." Schnuphase v. Storehouse Mkts., 918 P.2d 476, 478 (Utah 1996) (citing Allen v. Federated Dairy Farms, Inc., 538 P.2d 175, 176 (Utah 1975)). "In the second class, negligence is based on a showing that the store owner created the hazardous condition." Carlile, ¶8.

Applying this two pronged test to the case at bar, the Plaintiff's theories of recovery must allege that (1) the store owner had actual or constructive knowledge of the hazardous condition or (2) the store owner created the hazardous condition. Upon information and belief, Plaintiff does not contend that City Market created the actual hazardous condition, namely, the hole in front of its entry door. Plaintiff's theories of

recovery are embraced within the case law that has developed under the first prong of the test, namely, that the business owner **knew** of the hazard and didn't protect or warn the invitee about the danger or that the business owner **should have known** of the hazard and failed to exercise reasonable care in discovering the hazard and protecting or warning the invitee about the danger.

Plaintiff contends that the trial court in the case at bar started with a false presumption that the hazardous condition must exist on the leased premises for any liability to attach. City Market's argument, as adopted by the trial court, is best summarized in the statement of their counsel during oral argument:

> "That's an area that is not either owned or possessed under lease by City Market, at the time of the fall. Consequently, it would be an extreme change in Utah law to impose liability---premises liability—on an individual or an entity that is neither the owner nor the possessor of the land on which the offense occurred. Now that's about as simply as I can put it. We didn't own or posses the area where she fell."
> (Transcript of Oral Argument lines 6-14 p.4; ROA p. 230)

Neither the Utah Supreme Court in the cases above quoted, or any other of the modern authorities cited to the trial court during the motion, impose the requirement that the hazardous condition be on the leased premises much less "within the four walls" of the leased building as was argued by City Market. On the contrary, as pointed out by this Court in the Carlile case, Utah has long recognized that a business

owner has a duty to warn and/or protect its business invitees, irrespective of the location of the hazardous condition, as long as the business owner knows or should know of same:

> The Utah Supreme Court has recognized that business owners have a duty to protect customers from "'physical harm caused by the accidental, negligent, or intentionally harmful acts of third parties.'" Dwiggins v. Morgan Jewelers, 811 P.2d 182, 183 (Utah 1991) (quoting Restatement (Second) of Torts § 344 (1955)); see also Pagan v. Thrift City, 23 Utah 2d 207, 460 P.2d 832, 834 (1969). Business owners further have a duty to "'discover that such acts are being done or are likely to be done'" or "'give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.'" Dwiggins, 811 P.2d at 183 (quoting Restatement (Second) of Torts § 344). However, "that duty does not arise until the business owner knows, or should know, that [such] acts are likely to occur." Carlile, ¶12.

The correct analysis looks to what a reasonable business owner knows or should reasonably foresee about the risks that exist to his business invitees and not just to the location of the hazardous condition. That latter approach encourages business owners to retreat into their "four walls" and ignore risks, while the former analysis requires a business owner to be reasonable and prudent in the operation of the business. Following this Court's analysis in Carlile, one should look to the nature and circumstances around the hazardous condition:

> In defining this first class of premises liability, the Utah Supreme Court has held that a hazardous condition "involves some unsafe

> condition of a temporary nature, such as a slippery substance on the floor and usually where it is not known how it got there. In this class of cases it is quite universally held that fault cannot be imputed to the defendant so [no] liability results therefrom unless two conditions are met: (A) that he had knowledge of the condition, that is, either actual knowledge, or constructive knowledge because the condition had existed long enough that he should have discovered it; and (B) that after such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it. Schnuphase, 918 P.2d at 478 (citation omitted). Carlile, ¶9 [Emphasis added].

Application of these standards to the case at bar demonstrates that Plaintiff's legal theories, as alleged in her complaint, were sufficient to withstand a summary judgment motion if the correct law had been applied by the trial court. The facts establish that City Market was doing business in a shopping center in Price, Utah. City Market represented to Price City that, in addition to its building, it also has a right to the use of a designated number of specific parking stalls and a fire lane in the areas that surround its store, as designated in its site plan. It is asserted by City Market that those areas are common areas of the tenants of the shopping center even though the parking lot and fire lane in question are not in close proximity to the other tenants of the shopping center.. City Market's representation to Price City concerning its parking and fire lane areas had been on going and continuous from 1980 until the date of Plaintiff's injury on January 27, 1998, a period of almost twenty years. Price

City granted a business license to City Market each of those years in reliance on those representations. A jury could reasonably infer that City Market knew or should have known that the majority of their business invitees routinely parked in that designated parking lot and walked across the fire lane in a direct path toward the only public entrance to the store. A jury could also reasonably infer that a major construction project that repaved the entire shopping center parking lots and fire lane areas would have been discussed and planned with the store owners and that the store owners would have been monitoring same because of the impact on their businesses. A jury could also reasonably conclude that hundreds of people, including store management and employees, being funneled through one store entrance, would see a large hole in the pavement where the fire lane abuts the cement apron which forms the store's entrance since the hole was in plain view and within 12 feet of the door during daylight hours. Unlike the ice cream in the Schnuphase case , which can fall from a freezer and melt in minutes, asphalt that has been laid sufficiently long enough for the public to be allowed to park and walk across it, did not spontaneously create a hole by itself just in time to trap an unsuspecting customer pushing a loaded cart at night. It was alleged that the construction had ended before Plaintiff's injury. It was undisputed that all equipment and barricades were gone and that the parking lot and fire lane areas had been reopened to the public. The hole had been there long enough

that City Market Manager Sonny told Plaintiff he had put a stop sign, imbedded in a stand, into the hole after her accident because she had not been the first person to fall into the hole. A jury could reasonably conclude from those facts that City Market had direct knowledge of the hole or, at the very least, that a prudent and reasonable store owner would have discovered the hole and taken some affirmative action to protect the business invitees from the danger.

By contrast, the trial court starts its ruling by concluding that City Market did not have a duty to its business invitees in the common parking areas. It cited the Dwiggins and Pagan cases as being compelling precedence for this proposition. Any review of Dwiggins suggests that it stands only for the proposition that an event must be reasonably foreseeable to impose liability; but that if the event is reasonably foreseeable, then the business owner has a duty to the invitee. In Dwiggins, the plaintiff was making a purchase from Morgan Jewelers when the store was robbed and the plaintiff thus injured. Since Morgan Jewelers had no significant history of robberies and was not lax in its safety plans, the court found that the robbery was not a reasonably foreseeable event. The court went on to point out numerous cases where business owners have been held liable for the actions of third parties when the risk to the business invitee was foreseeable. Foreseeability is generally a factual issue and must be analyzed on a case by case basis. Applying the foreseeability requirement

in Dwiggins to the case at bar makes an even stronger argument for the Plaintiff's claim. An open hole in the asphalt within 12 feet of the only entrance to a busy supermarket and directly in line between the routinely used parking area for that store and the sole entrance creates not only a reasonably foreseeable risk to the invitees, but a highly likely risk. Add the fact that City Market invited its customers to shop at night in the dark, knowing that those customers had to approach the store on a direct collision path with the hole and the highly likely risk becomes an almost guaranteed injury.

The trial court's reliance on the Pagan case is even more confusing. It should be noted that the Pagan case was decided in 1969, which places it in the earliest stages of the development of the duty/risk analysis that is now utilized in our courts. Although the case is still valid law, it lacks the analysis of its more modern successors. In Pagan, defendant Thrift City leased a portion of its parking lot to a circus. A mother, attempting to get to the aid of her child on the merry-go-around, was injured. She filed suit against both the circus and Thrift City. On appeal from an order granting judgment to Thrift City, the court held that since there was no evidence that the merry-go-round was defective and no evidence of negligent operation by the circus, Thrift City could not be held liable for that which it did not know or could not discover. It should also be noted that the circus prevailed at trial for the same reasons.

In Pagan, the court did state "a possessor of land who holds it open to the public for business purposes is subject to liability for injuries to members of the public where harm is caused by negligent or intentional acts of third persons provided the possessor of the land failed to exercise reasonable care to discover that such acts are being done or likely to be done, or to give a warning adequate to enable visitors to avoid harm." Pagan, 460 P.2d 832, 835.

The case at bar meets each of the elements for liability in the above quote if we assume that City Market has some possessory interest in the common areas. City Market contends that third parties, namely defendant Barlow-Nielson, caused the harm to the Plaintiff by their negligent actions; however, City Market has failed to show that it exercised reasonable care to discover that such acts were being done or to give a warning that was adequate to enable visitors to avoid harm, even though that harm was plainly observable within a few feet of its door. Plaintiff has alleged that City Market failed on each of those duties, namely, the duty to exercise reasonable care to discover the act and the duty to warn the public. There were sufficient facts alleged, and not disputed, from which a jury could reasonably conclude that the hazardous condition either was actually known to City Market or that the risk should have been known to City Market because of its obvious nature and location. A hole in front of the door to a business is not a hidden or latent defect as alleged about the

merry-go-round in Pagan, but is a known hazard in plain view of any reasonable business owner and one that creates a duty to protect and to warn.

Since the trial court misconstrued the duty owed by a business owner to its business invitees, Plaintiff requests that this Court reverse the trial court's grant of summary judgment and remand the case for completion of discovery and trial.

## POINT TWO: THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE DISPUTED ISSUES OF FACT EXISTED, PARTICULARLY, WHERE THOSE DISPUTED FACTS WERE DIRECTLY RELATED TO PLAINTIFF'S THEORIES OF RECOVERY.

The standard of review on a motion for summary judgment has previously been quoted verbatim, discussed at length and cited in the Standard of Review section of this brief. The authorities cited therein, and the Smith case in particular, emphasize that the burden rests on the party moving for summary judgment to produce evidence and/or undisputed facts sufficient to entitle the moving party to a judgment as a matter of law.

In Smith, the Utah Supreme Court stated:

> There must exist undisputed facts in the evidence before the trial court relating to each of the elements of the legal doctrine upon which the trial court rests its decision to grant summary judgment in order for us to affirm the ruling. The existence of even one question of fact precludes us from granting summary judgment.
>
> [Quoting Smith, ¶24 and ¶53].

Applying these principles to the case at bar raises concern that the trial court not only ignored the significance of the disputed issues of fact, but also reversed the burden of proof from the moving party to the opposing party. Defendant City Market filed its motion for summary judgment without any supporting affidavits or evidence of any kind and expressly excluding its alleged lease. It asserted in its very short supporting memorandum that it leased only the building in which it conducted its business and therefore its premises liability was limited to those four walls. It expressly disavowed any lease, authority over or responsibility for the parking lot and fire lane, which it defined as common areas of the shopping center.

Plaintiff disputed those assertions with the sworn affidavit of Ms. Penovich from the Price City offices whose affidavit included City Market's own site plan showing what it represented to Price City was its designated portion of the parking area and the fire lane---a fire lane which the site plan shows services only City Market's isolated portion of the shopping center. The affidavit verified that City Market had used an almost identical site plan in order to first obtain, and then renew, its business license for almost twenty years prior to the time of Plaintiff's injury. That disputed fact alone went to the very heart of the trial court's reasoning, because it challenged the very premise on which the court rested much of its ruling, namely, that a duty was not owed to a business invitee in that common area.

The standard of review required that the moving party carry the burden of proving its lack of duty in the common areas. Since City Market failed to offer anything at all by way of evidence , since it failed to show undisputed facts for each of the elements of Plaintiff's theories of liability and specifically since they did not rebut the Penovich affidavit offered by the Plaintiff, the trial court should have found that a disputed issue of fact existed, that it related directly to the scope of defendant's duty and, therefore, summary judgment was precluded.

Additionally, Plaintiff alleged that city market knew or should have known of the hazardous condition located directly outside of its store entrance. Defendant City Market merely denied that a duty existed in what it defined as a common area. The burden was on defendant as the moving party to provide evidence that would refute, as a matter of law, the reasonable inferences that could be drawn from the undisputed facts. Facts like hundreds of people came and went from City Market's customary parking area to the only public store entrance on a daily basis for twenty years and that a prudent business owner would be expected to know that information and inspect and repair any hazards that developed in that traffic pattern, whether he had an obligation under contract to make those repairs or not. Facts like a hole located in a main traffic pattern was even more dangerous if the business owner conducted business at night and the hole was hidden from the artificial light by the pillar which

supported the defendant's building's awning. Undisputed facts like the repaving project had been over for some time, all equipment had been removed and the parking lots and fire lanes had reopened for public use. Undisputed facts which the court not only ignored but seemed to refute, without any evidence from the defendant, by concluding that the Plaintiff had not proved that the defendant had sufficient time to discover the defect nor that the injury was reasonably foreseeable. Those statements in the memorandum decision indicate that the trial court misunderstood the burden of proof required of the defendant and may even have improperly reversed it to place the burden on the Plaintiff.

Finally, since discovery was ongoing and Plaintiff's deposition was barely concluded before oral argument on the motion began, Plaintiff offered information from the deposition to support Plaintiff's allegations in her complaint that City Market actually knew the hazard existed. The deposition brought to light a conversation between defendant's manager Sonny and the Plaintiff wherein he told Plaintiff that other people had fallen in the hole. He said that after Plaintiff's injury, he took a stop sign which was imbedded in a stand, and placed it in the hole to prevent further injuries. That deposition testimony supported Plaintiff's theory of actual knowledge under the first prong of the test for premises liability and raised disputed issues of fact going directly to defendant's actual knowledge of the hazard

and its exercise of dominion and control over the common area which it had previously denied.

Since any one of the above stated disputed facts should have precluded summary judgment as a matter of law, Plaintiff requests that this Court reverse the trial court's grant of summary judgment and remand the case for completion of discovery and trial.

## CONCLUSION

Since the trial court did not apply the appropriate requirements and burdens of proof for a motion for summary judgment as outlined in the Smith case, and since the trial court misconstrued Utah's premises liability law and came to conclusions inconsistent with the Carlile case, Plaintiff prays that this Court reverse the trial court's grant of summary judgment and remand this case back to the trial court for the completion of discovery and the scheduling of trial as expeditiously as possible as this is an interlocutory appeal and the defendant not involved in this matter as been delayed during the pendency of this appeal.

Respectfully submitted this 18th day of November, 2004.

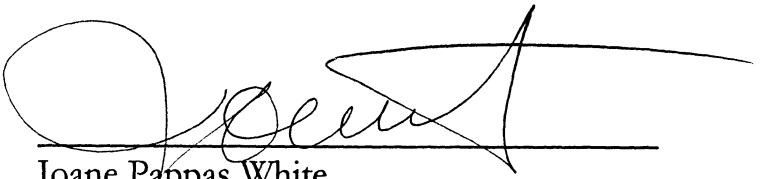
Joane Pappas White
Attorney of Plaintiff/Appellant

## CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed two (2) true and correct copies of the foregoing Brief of Appellant, by depositing the same, sealed, with first class postage prepaid thereon, in the United States Mail at Price, Utah on this 19th day of November, 2004, addressed to the following:

Scott Christensen
PLANT, WALLACE, CHRISTENSEN & KANELL, P.C.
Attorney for the Appellee
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111

Jeffrey C. Miner, No. 7258
MORGAN, MINNOCK & RICE, L.C.
Attorney for Defendant Barlow Nielsen Associates, Inc.
Kearns Building, Eight Floor
136 East South Temple
Salt Lake City, Utah 84111



Joane Pappas White
Attorney at Law

ADDENDA "A"

RULE 52, UTAH RULES OF CIVIL PROCEDURE,
FINDINGS OF THE COURT

RULE 56, UTAH RULES OF CIVIL PROCEDURE,
SUMMARY JUDGMENT

**Rule 52, Utah Rules of Civil Procedure, Findings by the Court.**

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) Waiver of findings of fact and conclusions of law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(1) by default or by failing to appear at the trial;

(2) by consent in writing, filed in the cause;

(3) by oral consent in open court, entered in the minutes.

**Rule 56, Utah Rules of Civil Procedure, Summary judgment.**

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

ADDENDA "B"

PRICE CITY ORDIANANCES
NO. 6-4-J AND L,
NOW 6.14.13

(1978- 1981) Exhibit B page one

# CHAPTER 6
# OFF-STREET PARKING REQUIREMENTS

## 6-1 OFF-STREET PARKING REQUIRED

At the time any building or structure is erected or enlarged or increased in capacity or any use is established, there shall be provided off-street parking spaces for automobiles in accordance with the following requirements, or as otherwise required by conditional use permit.

## 6-2 SIZE

The dimensions of each off-street parking space, exclusive of access drives or aisles, shall be at least ten (10) feet by twenty (20) feet for diagonal and ninety-degree spaces; and ten (10) feet by twenty-two (22) feet for parallel spaces.

## 6-3 ACCESS TO INDIVIDUAL PARKING SPACE

Except for single-family and two-family dwellings, direct access to each parking space shall be from a private driveway and not from a public street. All parking spaces shall have independent access not blocked by another parking space or other obstacle.

## 6-4 NUMBER OF PARKING SPACES REQUIRED

A. Business or Professional Offices. One parking space for each 200 sq. ft. of floor area.

B. Churches with Fixed Seating. One parking space for each 3.5 fixed seats, or one parking space for each seven (7) feet of linear pew, whichever is greater.

C. Churches Without Fixed Seats, Sports Arenas, Auditoriums, Theaters, Assembly Halls, Meeting Rooms. One parking space for each 3 seats of maximum seating capacity.

D. Dwellings. Two parking spaces for each dwelling unit.

E. Furniture and Appliance Stores. One parking space for each 600 sq. ft. of floor area.

F. Hospitals. Two parking spaces for each bed.

G. Hotels, Motels, Motor Hotels. One space for each living or sleeping unit, plus parking space for all accessory uses as herein specified.

H., Nursing Homes. Four parking spaces, plus one space for each five beds.

I. Restaurants, Taverns, Private Clubs, and All Other Similar Dining and/or Drinking Establishments. One parking space for each 3.5 seats or one parking space for each 100 square feet of floor area (excluding kitchen, storage, etc.), whichever is greater.

J. Retail Stores, Except as Provided in No. (E) above. One parking space for each 100 square feet of retail floor space.

K. Wholesale Establishments, Warehouses, Manufacturing Establishments, and All Industrial Uses. As determined by conditional use permit or by planned unit development requirements, if applicable, or by the Planning Commission, but in no case fewer than one space for each employee projected for the highest employment shift.

L. Shopping Center or Other Groups of Uses Not Listed Above. One parking space for each 150 square feet of total floor space, or as determined by conditional use permit.

M. All Other Uses Not Listed Above. As determined by conditional use permit based on the nearest comparable use standards.

## 6-5 ACCESS REQUIREMENTS

Adequate ingress and egress to and from all uses shall be provided as follows:

A. Residential Lots. For each residential lot: not more than one driveway which shall be a maximum of twenty (20) feet wide at the street lot line.

B. Other Than Residential Lots. Access shall be provided to meet the following requirements:

1. Not more than two (2) driveways shall be used for each one hundred (100) feet of frontage on any street.

2. No two (2) of said driveways shall be closer to each other than twelve (12) feet, and no driveway shall be closer to a side property line than three (3) feet.

3. Each driveway shall be not more than thirty-five (35) feet wide, measured at right angles to the

space for each 200 square feet of floor area, whichever is greater.

**6.4.10.1** In addition, drive-in facilities shall provide sufficient stacking area for cars in a drive through lane in such a way as not to overhang or back up on public property.

**6.4.11 RETAIL STORES**: except as provided in No. 6.4.5 above: one parking space for each 20 square feet of retail floor space.

**6.4.11.1** In addition, convenience stores which sell gasoline shall provide sufficient stacking area for cars in drive through lanes in such a way as not to overhang or back up on public property.

**6.4.11.2** The stacking area may be considered to help fulfill the basic parking requirements.

**6.4.12 WHOLESALE ESTABLISHMENTS, WAREHOUSES, MANUFACTURING ESTABLISHMENTS, AND ALL INDUSTRIAL USES**: as determined by conditional use permit or by planned unit development requirements, if applicable, or by the Planning Commission, but in no case fewer than 1 space for each employee projected for the highest employment shift.

**6.4.13 SHOPPING CENTER OR OTHER GROUPS OF USES NOT LISTED ABOVE**: one parking space for each 200 square feet of total floor space, or as determined by conditional use permit.

**6.4.14 ALL OTHER USES NOT LISTED ABOVE**: as determined by conditional use permit based on the nearest comparable use standards.

**6.4.14.1** Sufficient parking should be provided to assure:

**6.4.14.1.1** maximum utilization of the facilities on site will not unduly impose on neighbors rights in the vicinity;

**6.4.14.1.2** that in the future if there is a change of use that the parking is adequately related to the site so that a new use has a reasonable chance to provide satisfactory parking;

**6.4.14.1.3** where precise applicable parking standards are not known or have proven unsatisfactory in other instances, the analysis of the parking requirements of the site a: its proposed use is to assure a reasonable number of parking spaces that cannot become an excuse for failure of the use on the site to perform its function properly; and

**6.4.14.1.4** the intent of minimum parking requirements is that normal or competitive functions are not to be curtailed due to lack of sufficient parking and therefore the use or function of the principal user of the site fails or otherwise deteriorates.

**6.4.15** It shall be the responsibility of the reviewing body to prepare its analysis of parking requirements in writing and make copies available to the property owner(s)/lessee(s) and other parties of interest, as well as the city council.

**6.4.16** No parking on sidewalks or designated pedestrian paths.

**6.4.17** Parking for disabled individuals shall be provided meeting ADA requirements.

## 6.5 ACCESS REQUIREMENTS

**6.5.1** Adequate ingress and egress to and from all uses shall be provided as follows:

**6.5.1.1 RESIDENTIAL LOTS.** For each residential lot not more than 1 access driveway which shall be a maximum of 20 feet wide at the street lot line, except lots with a frontage greater than 100 feet have the option to provide 2 access driveways each up to 12 feet wide for circular driveways and other special type circulation and parking.

**6.5.1.2 OTHER THAN RESIDENTIAL LOTS.** Access shall be provided to meet the following requirements:

ADDENDA "C"

UTAH GOVERNMENTAL IMMUNITIES ACT,
SECTION 63-30D301.
WAIVERS OF IMMUNITY-EXCEPTIONS

**Utah Government Immunity Act, Section 63-30d-301. Waivers of immunity -- Exceptions.**

(1) (a) Immunity from suit of each governmental entity is waived as to any contractual obligation. Emphasis Added.

(2)Actions arising out of contractual rights or obligations are not subject to the requirements of Sections 63-30d-401, 63-30d-402, 63-30d-403, or 63-30d-601.

(c) The Division of Water Resources is not liable for failure to deliver water from a reservoir or associated facility authorized by Title 73, Chapter 26, Bear River Development Act, if the failure to deliver the contractual amount of water is due to drought, other natural condition, or safety condition that causes a deficiency in the amount of available water.

(2) Immunity from suit of each governmental entity is waived:

(a) as to any action brought to recover, obtain possession of, or quiet title to real or personal property;

(b) as to any action brought to foreclose mortgages or other liens on real or personal property, to determine any adverse claim on real or personal property, or to obtain an adjudication about any mortgage or other lien that the governmental entity may have or claim on real or personal property;

(c) as to any action based on the negligent destruction, damage, or loss of goods, merchandise, or other property while it is in the possession of any governmental entity or employee, if the property was seized for the purpose of forfeiture under any provision of state law;

(d) subject to Subsection 63-30d-302(1), as to any action brought under the authority of Article I, Section 22, of the Utah Constitution, for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation;

(e) subject to Subsection 63-30d-302(2), as to any action brought to recover attorneys' fees under Sections 63-2-405 and 63-2-802; or

(f) for actual damages under Title 67, Chapter 21, Utah's Protection of Public Employees Act.

(3) (a) Except as provided in Subsection (3)(b), immunity from suit of each governmental entity is waived as to any injury caused by:

(i) a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

(ii) any defective or dangerous condition of a public building, structure, dam, reservoir, or other public improvement.

(b) Immunity is not waived if the injury arises out of, in connection with, or results from:

(i) a latent dangerous or latent defective condition of any highway, road,

street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

(ii) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement.

(4) Immunity from suit of each governmental entity is waived as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment.

(5) Immunity is not waived under Subsections (3) and (4) if the injury arises out of, in connection with, or results from:

(a) the exercise or performance, or the failure to exercise or perform, a discretionary

function, whether or not the discretion is abused;

(b) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;

(c) the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization;

(d) a failure to make an inspection or by making an inadequate or negligent inspection;

(e) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;

(f) a misrepresentation by an employee whether or not it is negligent or intentional;

(g) riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;

(h) the collection of and assessment of taxes;

(i) the activities of the Utah National Guard;

(j) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;

(k) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire, and State Lands;

(l) research or implementation of cloud management or seeding for the clearing of fog;

(m) the management of flood waters, earthquakes, or natural disasters;

(n) the construction, repair, or operation of flood or storm systems;

(o) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6-14;

(p) the activities of:

(i) providing emergency medical assistance;

(ii) fighting fire;

(iii) regulating, mitigating, or handling hazardous materials or hazardous wastes;

(iv) emergency evacuations;

(v) transporting or removing injured persons to a place where emergency medical assistance can be rendered or where the person can be transported by a licensed ambulance service; or

(vi) intervening during dam emergencies;

(q) the exercise or performance, or the failure to exercise or perform, any function pursuant to Title 73, Chapter 10, Board of Water Resources - Division of Water Resources; or

(r) unauthorized access to government records, data, or electronic information systems by any person or entity.

ADDENDA "D"

PLAINTIFF'S COMPLAINT

JOANE PAPPAS WHITE #3445
Attorney for Plaintiff
Fifth Street Plaza, Suite 1
475 East Main Street
Price, Utah 84501
Telephone: (435) 637-0177

ORIGINAL

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH

| | |
|---|---|
| PATTY HEVELONE,<br>Plaintiff,<br>Vs.<br><br>CITY MARKET, INC.<br>a Colorado Corporation,<br>THE UTAH STATE RETIREMENT OFFICE, and BARLOW NIELSEN ASSOCIATES, INC., JOHN DOES 1-5<br><br>Defendants. | COMPLAINT AND JURY DEMAND<br><br>Case No. 020700047<br><br>Judge Hilliday |

COMES NOW the Plaintiff, by and through her attorney, Joane Pappas White, and hereby complains of the Defendants and alleges as follows:

**JURISDICTIONAL ALLEGATIONS**

1. Plaintiff is a resident of Carbon County, State of Utah, and has been at all times material hereto.

2. City Market, Inc., a Colorado corporation, hereinafter referred to as City Market, is authorized to do business in the State of Utah. Said corporation operated a local City Market retail store in Price, Carbon County, State of Utah at the time applicable hereto.

3. The Utah State Retirement Office, hereinafter referred to as State Retirement, is the owner of the property upon which the City Market retail store was located in Price, Carbon County, State of Utah at the time applicable hereto.

4. That Barlow Nielsen Associates, Inc., hereinafter referred to as Barlow Nielsen, a Utah corporation, in the business of managing real estate for property owners, was the property manager for Defendant Retirement Office, on the subject property located in Price, Carbon County, State of Utah.

5. John Does 1-5 are persons and/or entities currently unknown to the Plaintiff who may have been responsible for or contributed to the accident which gives rise to this cause of action.

6. The amount in controversy exceeds the minimum limits for jurisdiction in the District Court, exclusive of costs.

**GENERAL ALLEGATIONS**

7. In the early evening hours of January 27, 1998, the Plaintiff had entered Defendant City Market's retail grocery store in Price, Carbon County, State of Utah for purposes of purchasing various items of merchandise, particularly three cases of soda pop.

8. As Plaintiff walked out of the Defendant City Market's grocery store, pushing her grocery cart filled with

three cases of soda pop, she turned and approached the paved portion of the parking lot. Suddenly the front right wheel of the shopping cart dropped into a large opening which appears to have been an open manhole, which caused the shopping cart to lunge forward into the hole. As the cart lunged forward, the back of it popped up and hit the Plaintiff with such force that it knocked her down.

9. Plaintiff received a significant blow to her left knee as the rear of the shopping cart raised into the air. The blow to the Plaintiff's left knee and left portion of her body had knocked her to the ground and a bystander had to help her back to her feet.

10. The Plaintiff observed that the actions of the shopping cart were the direct result of the fact that a manhole area had been left with a large deep opening and unbarricaded or unmarked in any way as part of a re-paving and/or construction project in the parking area.

11. Defendant City Market knew or should have known that it's business invitees would be traveling back and forth across the paved parking area immediately adjacent to their store front in order to enter and exit the store property and that during the night time hours, business invitees could be injured as a result of the unbarricaded opening located in the pavement. That Defendant City Market was negligent in failing to warn its

business invitees or take other steps necessary to protect its business invitees from such hazard.

12. To the best of Plaintiff's information and belief, the property upon which the City Market store is located in owned by the Utah State Retirement Office and is managed on their behalf by Barlow Nielson Associates, Inc., a professional property manager. Said property owner and its agent manager knew or should have known that construction projects were ongoing in the parking lot area adjacent to its tenant's City Market store and that said landlord and its agent have a duty to maintain the property in a safe and reasonable manner. That the presence of a deep unbarricded opening was an obvious hazard in the parking area, particularly when it was adjacent to the entrance and exit of a busy retail store. That they knew or should have known that persons would be traveling to and from the business entrance and that an open hole in the pavement would be a hazard, particularly during night time hours.

13. That the Defendants, and each of them, owed a duty to the Plaintiff with respect to the maintenance of the property upon which the City Market store was located and that they were negligent in the performance of said duty and that their negligence was the direct and proximate cause of the injuries sustained by the Plaintiff on January 27, 1998.

14. As a result of the Defendants negligence, Plaintiff sustained injuries and has incurred past and present medical expenses and will continue to incur future medical expenses in a amount to be more specifically proven at the time of trial.

15. Since the date of injury, the Plaintiff has continued to experience significant problems with her left knee and the problems have continued to a point where the Plaintiff anticipates the necessity of surgery.

16. Plaintiff has sustained a permanent partial disability/impairment as a result of the injury sustained in the City Market parking lot on January 27, 21998 and the Defendants, and each of them, are responsible therefore.

17. The Defendants, and each of them, knew or should have known, and it was reasonable foreseeable, that in business invitees to the City Market store could be injured in the event that they stepped into the open manhole area in the asphalt.

18. It was reasonable foreseeable to all of the Defendants that the Plaintiff would be injured in the event that she either fell into such a hole or was hit by a shopping cart that fell into the hole and, therefore, the Plaintiff's injuries were directly and proximately caused by the negligence of the Defendants, and each of them.

19. The Plaintiff has incurred substantial physical and mental pain and suffering and anguish as a result of the injuries

she sustained in the subject incident and she requests an award of damage for such loss.

20. The Plaintiff has incurred lost earnings and lost enjoyment of life as a result of the injuries sustained in this incident and requests an award of same.

21. Plaintiff will incur court costs and attorneys fees in this matter and requests an award of same.

22. Plaintiff is entitled to interest from the date of the injury until the date of entry of judgment and interest on any judgment issued herein at the legal rate.

**WHEREFORE**, Plaintiff prays for relief as follows:

1. Plaintiff prays for a trial by jury; and

2. The Plaintiff prays that she be awarded past, present and future medical expenses in an amount to be more fully proven at the time of trial but in at least the sum of $10,400.00 in past medical expenses; and

3. That Plaintiff be awarded damages for her permanent partial disability/impairment; and

4. That Plaintiff be awarded damages for her past, present and future loss of earnings and/or earning capacity; and

5. That Plaintiff be awarded damages for past, present and future mental and physical pain, suffering and anguish caused as a result of the injuries sustained by the Plaintiff and which were proximately caused by the negligence of the Defendants, and

each of them; and

6. That Plaintiff be awarded damages for her lost enjoyment of life and activity in an amount to be more fully proven at the time of trial; and

7. That the Plaintiff be awarded her Court costs and attorneys fees in this matter; and

8. That Plaintiff be awarded interest from the date of injury until the entry of judgment and that any judgment issued herein bear interest at the legal rate; and

9. For such other and further relief as the Court deems just and equitable in the premises.

DATED this 18th day of January, 2002.

JOANE PAPPAS WHITE
Attorney at Law

ADDENDA "E"

AFFIDAVIT OF MOLLY PENOVICH

JOANE PAPPAS WHITE #3445
Attorney for Plaintiff
Fifth Street Plaza, Suite 1
475 East Main Street
Price, Utah 84501
Telephone: (435) 637-0177

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH

| | |
|---|---|
| PATTY HEVELONE,<br>Plaintiff,<br>Vs.<br><br><br>CITY MARKET, INC.<br>a Colorado Corporation,<br>THE UTAH STATE RETIREMENT OFFICE, and BARLOW NIELSEN ASSOCIATES, INC.,<br>JOHN DOES 1-5<br><br>Defendants. | **AFFIDAVIT OF MOLLY PENOVICH**<br><br><br><br><br>Case No. 020700047<br><br><br>Judge Bruce K. Halliday |

STATE OF UTAH )
:ss.
COUNTY OF CARBON )

I, Molly Penovich, being first duly sworn upon oath, hereby deposes and states as follows:

1. I am one of three employees of the Planning and Zoning Department for Price City, Utah, who has official access to the records of said department. I have researched said records and found the attached site plan filed by City Market in 1980.

2. Attached is the site plan presented by City Market in 1980, showing their building and their required parking spaces. Those parking spaces were required in order to obtain the City

Market original business license from that time period. (See attached Exhibit A).

3. Price City requires all businesses to provide a minium number of parking spaces for their customers as more fully outlined in Ordinance No. 6-4-J and L of the Price City Ordinances. Said ordinances were modified by the Price City Land Use Management and Development Code of 1997. (Both original ordinance and the revised ordinance are attached hereto as Exhibit B).

4. City Market's parking site plan remained basically the same throughout the years they were licensed to conduct business in Price City, Utah, including 1998.

DATED this 23rd day of January, 2004.

Molly Penovich
Employee of Price City
Planning and Zoning Dept.

Subscribed and sworn to before me this 23RD day of January, 2004.

KATHLEEN ATWOOD
NOTARY PUBLIC • STATE of UTAH
100 N. 200 W. #13
HUNTINGTON, UT 84528
COMM. EXPIRES 12-2-2007

Notary Public

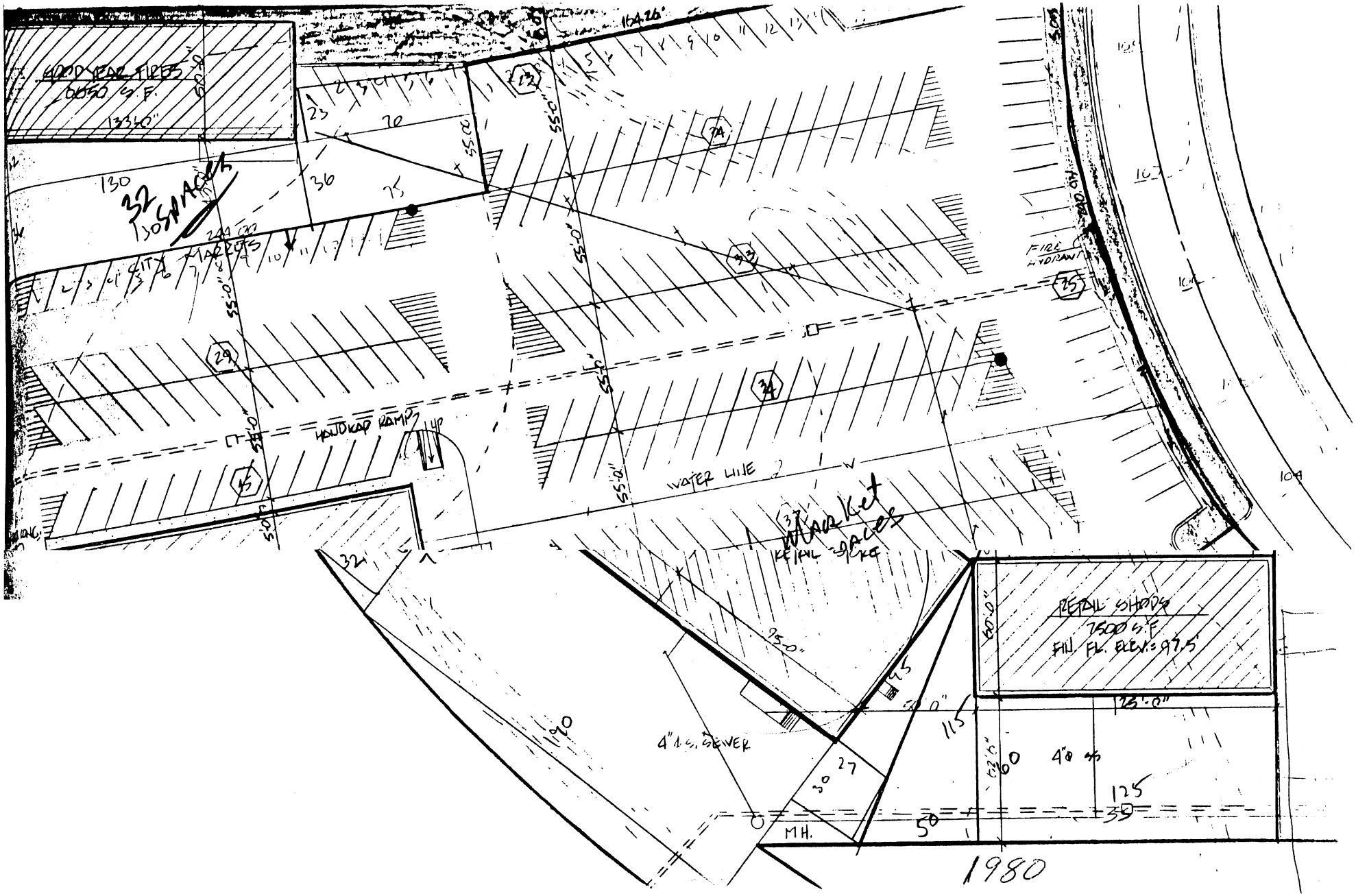
CERTIFICATE OF MAILING AND FACSIMILE

I hereby certify that on the 23RD day of January, 2004, I caused a true and correct copy of the above and foregoing Affidavit of Molly Penovich to be sent by United States mail, first class postage prepaid to:

Scott Christensen
PLANT, WALLACE, CHRISTENSEN & KANELL, P.C.
Attorney for Defendant City Market
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111

Jeffrey C. Miner, No. 7258
MORGAN, MINNOCK & Rice
136 South Main Street
Kearns Building, Eighth Floor
Salt Lake City, Utah 84101

Cathy Atwood
Secretary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MH.
1980

(1978 - 1981) Exhibit B page one

# CHAPTER 6
# OFF-STREET PARKING REQUIREMENTS

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## 6-4 NUMBER OF PARKING SPACES REQUIRED

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C. Churches Without Fixed Seats, Sports Arenas, Auditoriums, Theaters, Assembly Halls, Meeting Rooms. One parking space for each 3 seats of maximum seating capacity.

D. Dwellings. Two parking spaces for each dwelling unit.

E. Furniture and Appliance Stores. One parking space for each 600 sq. ft. of floor area.

F. Hospitals. Two parking spaces for each bed.

G. Hotels, Motels, Motor Hotels. One space for each living or sleeping unit, plus parking space for all accessory uses as herein specified.

H., Nursing Homes. Four parking spaces, plus one space for each five beds.

I. Restaurants, Taverns, Private Clubs, and All Other Similar Dining and/or Drinking Establishments. One parking space for each 3.5 seats or one parking space for each 100 square feet of floor area (excluding kitchen, storage, etc.), whichever is greater.

J. Retail Stores, Except as Provided in No. (E) above. One parking space for each 100 square feet of retail floor space.

K. Wholesale Establishments, Warehouses, Manufacturing Establishments, and All Industrial Uses. As determined by conditional use permit or by planned unit development requirements, if applicable, or by the Planning Commission, but in no case fewer than one space for each employee projected for the highest employment shift.

L. Shopping Center or Other Groups of Uses Not Listed Above. One parking space for each 150 square feet of total floor space, or as determined by conditional use permit.

M. All Other Uses Not Listed Above. As determined by conditional use permit based on the nearest comparable use standards.

## 6-5 ACCESS REQUIREMENTS

Adequate ingress and egress to and from all uses shall be provided as follows:

A. Residential Lots. For each residential lot: not more than one driveway which shall be a maximum of twenty (20) feet wide at the street lot line.

B. Other Than Residential Lots. Access shall be provided to meet the following requirements:

1. Not more than two (2) driveways shall be used for each one hundred (100) feet of frontage on any street.

2. No two (2) of said driveways shall be closer to each other than twelve (12) feet, and no driveway shall be closer to a side property line than three (3) feet.

3. Each driveway shall be not more than thirty-five (35) feet wide, measured at right angles to the

space for each 200 square feet of floor area, whichever is greater.

**6.4.10.1** In addition, drive-in facilities shall provide sufficient stacking area for cars in a drive through lane in such a way as not to overhang or back up on public property.

**6.4.11 RETAIL STORES**: except as provided in No. 6.4.5 above: one parking space for each 20 square feet of retail floor space.

**6.4.11.1** In addition, convenience stores which sell gasoline shall provide sufficient stacking area for cars in drive through lanes in such a way as not to overhang or back up on public property.

**6.4.11.2** The stacking area may be considered to help fulfill the basic parking requirements.

**6.4.12 WHOLESALE ESTABLISHMENTS, WAREHOUSES, MANUFACTURING ESTABLISHMENTS, AND ALL INDUSTRIAL USES**: as determined by conditional use permit or by planned unit development requirements, if applicable, or by the Planning Commission, but in no case fewer than 1 space for each employee projected for the highest employment shift.

**6.4.13 SHOPPING CENTER OR OTHER GROUPS OF USES NOT LISTED ABOVE**: one parking space for each 200 square feet of total floor space, or as determined by conditional use permit.

**6.4.14 ALL OTHER USES NOT LISTED ABOVE**: as determined by conditional use permit based on the nearest comparable use standards.

**6.4.14.1** Sufficient parking should be provided to assure:

**6.4.14.1.1** maximum utilization of the facilities on site will not unduly impose on neighbors rights in the vicinity;

**6.4.14.1.2** that in the future if there is a change of use that the parking is adequately related to the site so that a new use has a reasonable chance to provide satisfactory parking;

**6.4.14.1.3** where precise applicable parking standards are not known or have proven unsatisfactory in other instances, the analysis of the parking requirements of the site a: its proposed use is to assure a reasonable number of parking spaces that cannot become an excuse for failure of the use on the site to perform its function properly; and

**6.4.14.1.4** the intent of minimum parking requirements is that normal or competitive functions are not to be curtailed due to lack of sufficient parking and therefore the use or function of the principal user of the site fails or otherwise deteriorates.

**6.4.15** It shall be the responsibility of the reviewing body to prepare its analysis of parking requirements in writing and make copies available to the property owner(s)/lessee(s) and other parties of interest, as well as the city council.

**6.4.16** No parking on sidewalks or designated pedestrian paths.

**6.4.17** Parking for disabled individuals shall be provided meeting ADA requirements.

## 6.5 ACCESS REQUIREMENTS

**6.5.1** Adequate ingress and egress to and from all uses shall be provided as follows:

**6.5.1.1 RESIDENTIAL LOTS.** For each residential lot not more than 1 access driveway which shall be a maximum of 20 feet wide at the street lot line, except lots with a frontage greater than 100 feet have the option to provide 2 access driveways each up to 12 feet wide for circular driveways and other special type circulation and parking.

**6.5.1.2 OTHER THAN RESIDENTIAL LOTS.** Access shall be provided to meet the following requirements:

ADDENDA "F"

MEMORANDUM DECISION ON DEFENDANT,
CITY MARKET, INC.'S MOTION FOR SUMMARY JUDGMENT

# IN THE SEVENTH DISTRICT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH

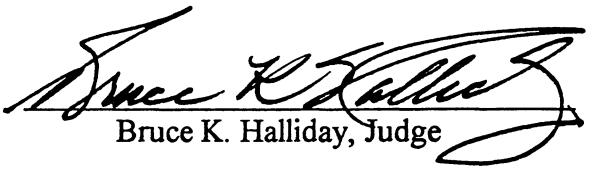
| | |
|---|---|
| **PATTY HEVELONE,**<br>**Plaintiff,** | **MEMORANDUM DECISION ON DEFENDANT, CITY MARKET, INC.'s MOTION FOR SUMMARY JUDGMENT** |
| **vs.** | **Case No.** 020700047 |
| **CITY MARKET, INC., et al**<br>**Defendant.** | **Judge Bruce K. Halliday** |

The Court having heard Oral Arguments on the 17th day of February, 2004, and having now reviewed the pleadings as well as the case law cited by the parties, concludes that the Motion for Summary Judgment is well taken as same is applicable to defendant, City Market Inc. The Court could find no question of fact that prevents the granting of the relief sought by defendant, City Market. The Court believes, as contended by City Market, that the plaintiff has failed to establish a duty of City Market to the business invitees while such business invitees are in the common use parking area involved herein. The Court found particularly compelling the arguments made by defendant and the citations to the Dwiggins vs. Morgan Jewelry's case and especially the Pagan vs. Thrift City case where the Court, even though Thrift City was apparently the possessor of the parking area, at least to the extent that it granted permission to the Siebrand Circus for the use thereof, was nevertheless held not responsible for injuries. The Court also believes that, as alleged by City Market, the plaintiff failed to establish that City Market had any actual or constructive knowledge of the allegedly dangerous condition or that City Market was aware of the condition for a sufficient time to have taken measures to correct the problem. The paucity or absence of evidence thereto was controlling in the Court's conclusion that the Motion for Summary Judgment against the plaintiff in favor of City Market should be and is hereby granted.

City Market's counsel is instructed to draft Findings of Fact, Conclusions of Law, and an Order accordingly.

Dated this 5-th day of April, 2004.

**BY THE COURT:**



Bruce K. Halliday, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of April, 2004, I mailed a true and correct copy of the foregoing **MEMORANDUM DECISION ON DEFENDANT, CITY MARKET, inc., COLORADO CITY'S MOTION FOR SUMMARY JUDGMENT** , postage prepaid, to the following:

Plant, Christensen & Kanell, P.C., 136 E. S. Temple, Suite #1700, SLC, UT 84111
Joane Pappas White, Attorney at Law, Fifth Street Plaza, #1, 475 E. Main, Price, UT 84501
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B Ann Cannon
Court Clerk

ADDENDA "G"

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER

SCOTT W. CHRISTENSEN, UBN 0649
**PLANT, CHRISTENSEN & KANELL, P.C.**
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(801) 363-7611

Attorneys for Defendant City Market, Inc.



IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY,

STATE OF UTAH

| | | |
|---|---|---|
| PATTY HEVELONE,<br><br>Plaintiff,<br><br>v.<br><br>CITY MARKET, INC., a Colorado corporation, THE UTAH STATE RETIREMENT OFFICE, and BARLOW NIELSEN ASSOCIATES, INC., JOHN DOES 1 - 5,<br><br>Defendants. | ) | **FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER**<br><br>Civil No. 020700047<br>Judge Bruce K. Halliday |

Defendant, City Market Inc.'s Motion for Summary Judgment came before the Court on February 17, 2004 for Oral Arguments. The Court, having heard oral arguments, having reviewed the motions and authorities cited therein, and being fully advised, enters the following Findings of Facts, Conclusions of Law and resulting Order:

## FINDINGS OF FACTS

1. Plaintiff has failed to establish a duty of City Market Inc. to its business invitees while such business invitees are in the common use parking area.

2. Plaintiff has failed to establish that City Market Inc. had actual or constructive notice of the allegedly dangerous conditions in the common area.

3. Plaintiff has failed to establish that City Market, Inc. was aware of the allegedly dangerous conditions for a sufficient time to have taken measures to correct the problem.

## CONCLUSIONS OF LAW

1. City Market Inc. had no duty to protect plaintiff from an allegedly dangerous condition located on property it did not own or have a right to possess.

2. Without sufficient evidence to establish actual or constructive knowledge of the allegedly dangerous condition in the common area on the part of City Market, Inc., plaintiff has failed to establish an essential element of her burden of proof of negligence.

3. Without sufficient evidence to establish that City Market, Inc. was aware of the allegedly dangerous condition in the common area on the part of City Market, Inc. for a sufficient time to have taken measures to correct the problem, plaintiff has failed to establish an essential element of her burden of proof of negligence.

**ORDER**

Based upon the foregoing Findings of Facts and Conclusions of Law,

IT IS HEREBY ORDERED that defendant City Market, Inc.'s Motion for Summary Judgment is granted. All claims against defendant City Market, Inc. are dismissed with prejudice. There being no just reason for delay, this Order is final as to defendant City Market, Inc.

DATED this 3rd day of May, 2004.

**BY THE COURT**

JUDGE BRUCE K. HALLIDAY

APPROVED AS TO FORM:

JOANE PAPPAS WHITE

ADDENDA "H"

DEPOSITION OF PLAINTIFF
PAGES 134-137

Q. Why did you think it was important to tell me about those people.
**A. Well, because you asked me what took place --**
Q. Sure.
**A. -- and so I started with parking my car and going in. And just -- you asked me what I remember, and those -- little man and old lady in her thing were right there, so I went around them. That's something I can remember.**
Q. Okay. Had you ever parked in that location before in going into that store?
**A. Yeah, and in handicapped parking and -- I've parked all over.**
Q. Had you ever parked specifically in that area, though?
**A. I would probably have to say yes.**
Q. Okay. And you've entered and exited the store similarly to the way you did it that evening?
**A. Well, I exit out just depending on which way the car is.**
Q. Sure, but I'm saying on the times where you parked in the same location that you parked that night, would your entrance and exit from the store have been pretty much the same path?



**A. Well, again, just depending on where I was parking. Like, if I was parked over here --**
Q. No, I'm saying if you were parked in the same place.
**A. Oh, in the same spot. Yes.**
Q. And had you ever noticed the hole that you fell in before this night? Had you ever seen it there before?
**A. No.**
Q. Ever stepped into it before?
**A. No.**
Q. Do you have any estimate how long it had been there before the night of the accident?
**A. No.**
Q. Okay. Did you ever receive any indication from the employees at City Market that you spoke with that they knew about the hole?
**A. Yes.**
Q. What did they say to you?
**A. Sonny said that a few people had gotten hurt from the hole.**
Q. From that same hole?
**A. Um-hum.**
Q. Okay. Did he tell you names or specifics?
**A. No. They put the stop sign over the hole**



**so people wouldn't fall anymore.**
Q. So after your accident, they put a stop sign in the hole?
**A. Um-hum, a long stick with a big ring.**
Q. With a base that basically fills the hole?
**A. It's like a tire rim, and a stop sign goes in it.**
Q. Is that what we're seeing in those pictures that counsel showed you? There's a metal ring in one of the holes.
**A. Well, there was the manhole.**
Q. No, there was the manhole, but there was also a metal ring next to it. He'll grab it. Just one second.
MR. CHRISTENSEN: If I can find them again.
Q. (By Mr. Linton) Is that what you're talking about?
**A. Yep, that's what I'm talking about.**
Q. Is that a picture of the hole you fell in, then?
**A. Let me see it one more time.**
**I believe it is because I had noticed, when we went down to get the check, that he had suddenly put a sign there.**
Q. Put the stop sign there.



So were those pictures -- there are two listed at the bottom, one with you and your tennis shoe standing in the hole and then one with the thing as you said, like a tire rim in the hole. Is that the same hole?
**A. I would -- I don't know. I can't remember.**
Q. Okay.
**A. I really can't remember if -- if -- all -- I can't remember if we moved that to get -- no, the picture wasn't covered yet -- the hole wasn't covered yet.**
Q. So that sign that we're talking about was in a different location there?
**A. It was up a ways. It was right in the middle between the manhole and that hole.**
**But, anyway, Sonny did say that they put it over the hole so nobody would fall in it.**
Q. So you're saying that they moved the location of that stop sign from where it was in the picture into the hole where you stepped -- where the cart went into?
**A. That's what Sonny said, yes.**
Q. And he told you that other people fell because of that same hole?
**A. Yes, yep.**

Q. Do you know how many people?
**A. No. He didn't say how many, he just said he had people that had fallen in that hole too.**
Q. And that was in the first conversation you had with Sonny?
**A. The second one, when I saw that they had covered it up with a stop sign.**
Q. So you saw they covered it up with a stop sign. You called them and said, Hey, what's the deal, that he explained that they --
**A. No. It was when I went in and got the check to pay my medical bill.**
Q. So is that -- as you were entering you noticed they put the stop sign in the hole, and you asked him about it
**A. Um-hum.**
Q. And he told you that other people had fallen?
**A. Yeah, they'd fallen in the hole as well.**
Q. Did they fall before or after you?
**A. I didn't ask him that. He just said it.**
Q. Okay. Based on your judgment, are there any other factors that could have added to your knee condition and your knee pain and your arthritis that I think was mentioned as well?



**A. What do you mean?**
Q. For example, you said that you were overweight before you had your gastric bypass. Do you think that could have been a factor that would have worn on your knee over time?
**A. No.**
Q. You don't think your weight could have caused your knee to be in a certain condition?
**A. No.**
Q. Are there any other factors in your life that could have affected your knee at any time?
**A. No.**
Q. Okay. And I understand that you weren't, as I said, overweight at the time of the accident, but you don't believe that the history of having that problem could have affected your knee?
**A. No, because if it had, I wouldn't have been able to do all the jobs I had done over the years.**
Q. Okay. You testified that you didn't see the hole before the cart went into it, right?
**A. Correct.**
Q. Were you looking for a hole in the parking lot?
**A. (No audible response.)**
Q. Not something you were paying attention to?



**A. (No audible response.)**
Q. That's a no?
**A. The shopping cart, the way it goes like this, the boy stacked all the pop closest to the end.**
Q. Uh-huh.
**A. So it was like the pop was right here. I'd have to go like that to push my cart. I wasn't looking for a hole, I was just pushing my cart.**
Q. Was it dark by the time you left the store?
**A. It was getting dark, yes.**
Q. So it still wasn't dark yet?
**A. No. It was dusk.**
Q. Had the lights turned on yet in the parking lot?
**A. I don't believe -- well, hum. I want to say yes.**
Q. But you're not sure?
**A. I'd have to go look through, but I think they were.**
Q. Okay. Judging by the hole when you went back to see it the other times and by what happened that evening, do you think, if you would have been looking for it, that you would have seen it?
**A. If I hadn't had a shopping cart full of groceries and I was walking out, I'm sure I would have**



**seen it from the distance.**
Q. Uh-huh.
**A. But with the cart full of food and pop stacked up as high as it was, you couldn't see it coming.**
Q. Well, I know that you didn't see it coming, but if you -- judging by how it looked after you saw it and after you knew about it, do you think, if you would have been looking for it, if you would have been looking ahead of yourself, that you would have seen it?
**A. Are you asking me would I have noticed it if I hadn't had a shopping cart?**
Q. No. I'm asking with the shopping cart that night, if you would have been specifically looking out ahead of the shopping cart, trying to notice where you were heading, do you think it's a big enough hole, it's a sizable location, that you would have been able to see it?
**A. No.**
Q. And what's your reason for saying that?
**A. Because if I'm taking the shopping cart, I have food in it, even -- even if it wasn't stacked up pop, okay, grocery sacks, paper grocery stacks sit at least this high. Here's the cart. Here's the bag.**